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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 386

JULES JEAN ROUGERON, *Petitioner,*

v.

JEANNE A. ROUGERON, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS STATE OF NEW YORK

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS STATE OF NEW YORK

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Jules Jean Rougeron, Petitioner above named, prays that a writ of certiorari issue to review the judgment of the Court of Appeals, State of New York entered in the above-entitled case.

CITATIONS TO OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals, dated May 5, 1966 are printed in the Appendix hereto, *infra,* page 1a and are reported at 17 N. Y. (2d) 264, 270 N.Y.S. (2d) 578, 217 N.E. (2d) 639. The judgment of the Appellate Division of the

Supreme Court of New York, entered without opinion, is printed in the Appendix hereto, *infra* page 13a and is reported in the New York Law Journal of July 9, 1965, page 7. The opinion of the Surrogate of New York County is printed in the Appendix hereto, *infra* page 16a and is reported in the New York Law Journal of February 4, 1963, pages 16-7.

JURISDICTION

The final judgment of the Court of Appeals (App. p. 1a) is dated May 5, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Does Article VI of the Swiss-United States Treaty of 1850 fix the exclusive jurisdiction of courts and the exclusive choice of law in the case of disputed inheritances in the country of the last domicile of the decedent, or in the country in which the property of the decedent is located?

2. If the Treaty chooses the country of the decedent's last domicile, how is the Treaty to be administered where the decedent leaves personal property in both Geneva and New York and where the Court of last resort of the Canton of Geneva decides *in personam* and *in rem* that the decedent was domiciled there and the court of last resort of the State of New York decides *in personam* and *in rem* that the decedent was domiciled there? Do both courts have exclusive jurisdiction over all the property or does each court have exclusive jurisdiction over the property located in its territory on the date of decedent's death?

3. Where a citizen of the United States dies in Geneva, leaving personalty in Geneva and in New York, and the widow voluntarily initiates probate in the Geneva probate court asserting Swiss domicile of the decedent, and carries the probate through to the securing of conditional physical possession of the Swiss personalty, and the widow thereafter transports the Swiss personalty physically to New York and initiates an independent new probate of the same property, asserting New York domicile of the decedent, does the Treaty oust the jurisdiction of the New York courts to undertake this second administration of the property and deny the New York courts the right to distribute it to any heirs or legatees except under the law of Switzerland?

4. Under the facts stated in (3) above, has the New York court, wholly apart from the Treaty, competency and jurisdiction to administer the Swiss assets, which were transported out of Geneva to New York, in derogation of the pending Geneva proceedings, thereby thwarting the sovereignty of the Swiss court and that court's ultimate disposition of the property?

5. Can the exertion of a "self-help remedy" by a party to the Swiss probate proceedings, physically removing the Swiss property from Geneva to New York, change the jural international relations between the United States and Switzerland and oust the sovereign jurisdiction of the Swiss courts over property located in Switzerland on date of death and legally in the possession of the Swiss probate court in pending and incompleted probate proceedings?

6. Is the rule of this Court, that, in cases where two state courts of the United States have concurrent

and independent probate jurisdiction, the court which first acquires possession of the *res* is entitled to administer it to the exclusion of the other court, applicable to a case where one state court of the United States and one court of a foreign country are involved?

7. Absent any treaty, where the court of last resort of Geneva, subsequent to the transport of the Swiss personalty by the widow from Geneva to New York, enters a final judgment *in personam* and *in rem* against the widow decreeing the devolution and inheritance of the property which had its "situs" in Switzerland on date of death, may the New York Surrogate thereafter enter a judgment *in personam* and *in rem* in favor of the widow decreeing the devolution and inheritance of that same property in direct contravention of the prior judgment of the Geneva court?

8. Absent any treaty, when it is disclosed to the New York court that it has before it personal property located in Geneva on date of death which is subject to pending proceedings in the Geneva court, and which has been transported to New York *pendente lite,* is the New York court free to ignore the pending Geneva proceedings or is it required to direct that the property be returned to Geneva for distribution under the pending proceedings there?

CONSTITUTIONAL PROVISIONS AND TREATIES

Constitution, Article VI—"This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges of every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."

Swiss-United States Treaty of 1850, Article VI—"Any controversy that may arise among the claimants to the same succession, as to whom the property shall belong, shall be decided according to the laws and by the judges of the country in which the property is situated."

(Note—a bi-lingual official text of the entire Treaty, issued by the Department of State, (GPO 879516) is photographically reproduced at page A177 of the Printed Record in the court below)

STATEMENT OF THE CASE*

(a) The family background

Marcel J. Rougeron, the decedent, was a native-born French citizen (Rec. A. 154, 234). As a young man in Paris in 1903, while still a French citizen, he fathered an illegitimate son, whom he promptly "acknowledged" legally, in conformity with French law (Rec. A. 143, 154, 232). The son was, and still is, a citizen and resident of France (Rec. A. 37, 154).

Later the decedent emigrated to the United States, became naturalized as a United States citizen, and married in Chicago in April, 1937 (Rec. A. 54, 143-4, 154, 234). His wife was also a native-born French citizen (Rec. A. 77, 144, 154), who became naturalized in the United States in August, 1959 (Rec. A. 70, 77), subsequent to final judgment of the Court of Appeals of Geneva of November 4, 1958 (see p. 10, *infra;* Rec. A. 172).

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* All references to the Appendix printed *infra* are indicated by "App.". All references to the Printed Record in the Court of Appeals, State of New York are indicated by "Rec.".

(b) The decedent's will

The decedent and his wife were living together in a home purchased by the husband at Vandoeuvres, in the Canton of Geneva, Switzerland, on April 15, 1954, the date of his death (Rec. A. 41, 144). The decedent left a holographic will in the French language, dated February 18, 1954, in which he sought to disinherit his natural son and to leave his entire estate to his widow. Further, he directed that the law of Illinois [which he erroneously claimed to be the state of which he was a "native" or "citizen" or from which he "originated", or in which he was "domiciled as to citizenship" (Rec. A. 45, 54, 155, 164, 189, 191, 244)] should govern the disposition of his estate. (Rec. A. 144, 155.)

(c) The Swiss probate proceedings of April, 1954

Promptly after her husband's death, the widow, then a French citizen residing in Geneva (Rec. A. 45, 57, 70, 140, 143, 144, 154) with the assistance of her notary, M. Gustave Martin of Geneva, initiated a Swiss probate proceeding by filing the will on April 21, 1954 with the Justice of the Peace Court in Geneva, in conformity with the law of Switzerland and the Canton of Geneva (Rec. A. 89, 188).

On April 29, 1954, fourteen days after date of death, the widow and the notary jointly signed and filed an inventory of the decedent's estate in the appropriate tribunal in Geneva (Rec. A. 42, 46-56). The inventory described the decedent as domiciled in Geneva and identified cash items aggregating $5,538.97 and Sw. F. 23,395.00 plus 400 shares of DuPont, 900 shares of Alcoa, 100 shares of Atchison and 700 shares of

General Electric as property of the decedent located in Switzerland on date of death (Rec. A. 49-51, 180-2).

The April 29, 1954 inventory showed that the decedent also had deposit accounts in several New York City banks.

The widow, with the assistance of the notary, continued the required proceedings under the Swiss probate law (Rec. A. 89-90). This culminated on August 14, 1954, with the issuance to the widow by the probate court in Geneva of a preliminary "Certificate of Heirship" which certified preliminarily that she was the sole heir of the decedent and of his entire estate (Rec. A. 57, 190-3). This certificate is "preliminary" since it is "under the reserve of any action for nullification or petition of heredity" (Rec. A. 192). That is, it may be set aside or amended or altered, if, within the period permitted by the Swiss statutes of limitation, appropriate court proceedings are brought (Rec. A. 89-90, 100-3, 192).

(d) The post-mortem removal of the Swiss assets to New York and the New York probate proceedings of April, 1955

With the Swiss probate proceedings thus pending and not finally determined, all the assets above-listed which were in Switzerland on date of death [the exact details of this were directed by the Surrogate to be developed in supplementary proceedings if necessary (Rec. A. 128)], were transported physically to New York City (Rec. A. 121, 124, 127-8). No information respecting these assets or the inventory was given to the son (Rec. A. 61, 62, 173).

In January, 1955, the son commenced a proceeding in the court of the Canton of Geneva,[1] the place of the probate, seeking the appointment of a sequestrator (Rec. A. 233). The lower court granted the relief sought. The widow appealed. The Court of Appeals reversed and dismissed the request for the special relief demanded (Rec. A. 233-4).

The widow, still a French citizen residing in Geneva (see p. 6, *supra*), on April 1, 1955, filed in New York City, through the office of Kelly Drye Newhall and Maginnes, a petition for the probate of the estate of her husband (Rec. A. 34-40).

This petition in Paragraph 8 correctly recited the existence of some assets of the decedent in New York on the date of death (Rec. A. 36). However, it gave no hint that there had already been a probate in Geneva, that the property which had been in Switzerland on the date of death was then under the continuing jurisdiction of the Swiss probate court, that this Swiss property had been physically removed from Switzerland to New York, *post mortem,* and that it was intended to submit this identical property to a second administration by the Surrogate.

(e) The son's objection to the New York probate

A citation was duly served upon the son who opposed the grant of the letters, on the single issue of domicile and no other issue (Rec. A. 219-228).

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[1] In the same month, proceedings were brought in the French courts by the son against the widow, which are irrelevant to the Treaty and constitutional issues here. These proceedings have been in the Cour de Cassation (Supreme Court of France) twice and are still pending and not yet finally decided (Rec. A. 136, 155, 201, 203-14).

The widow moved to dismiss the objections on the sole ground that the son was not a person entitled to object to the probate under New York law (Rec. A. 228, 232). The hearing on the motion to dismiss opened before Surrogate DiFalco on January 14, 1957 (Rec. A. 230). By an extraordinary coincidence, on that identical day the son instituted the formal contest *in personam* against the widow in the Geneva court to establish his share in the assets of his father which had been placed under the jurisdiction of the Swiss courts by the widow (Rec. A. 103, 104, 156).

No issue was raised at the hearing before Surrogate DiFalco respecting the physical location of the securities in question. All facts and information concerning the decedent's estate were denied the son in Switzerland from the date of decedent's death in 1954 until an order of the Court of Appeals of Geneva directed full disclosure in 1959 (Rec. A. 61, 62, 126-7, 173).

(f) The Surrogate's dismissal of the objections to probate

Surrogate DiFalco dismissed the son's objections to the grant of the letters. (Rec. A 232-9).

He found that the illegitimate son (even though he had been "recognized" by the decedent under French law) had no rights or standing of any kind under New York law to oppose the grant of letters. This ended the matter, but the Surrogate added two *dicta*. (1) He found the decedent's domicile to be in New York under New York concepts of domicile; and (2) he found the dismissal of the son's application for a sequestrator to be *res judicata* that the son had no rights of inheritance under Swiss law.

On May 16, 1957, a formal decree of probate was entered in favor of the Hanover Bank as administra-

tor, c.t.a. (Rec. A. 38, 72, 242-4), and the administration of the estate in New York proceeded in normal course.

(g) Initial decision against the son in Switzerland

The litigation in Switzerland likewise proceeded. Initially, the widow moved to dismiss the contest, on the ground of *lis pendens* (Rec. A. 156). This motion was denied (*ibid.*). Thereafter, the case was tried on the merits (Rec. A. 157), and the trial court, on April 14, 1958, dismissed the contest on the merits (Rec. A. 145, 150, 156). The son appealed on May 6, 1958 (Rec. A. 143, 157).

(h) The New York accounting

In New York, the widow and the Hanover Bank proceeded to an accounting and distribution of the entire estate before the Surrogate with no notice whatever to the son (Rec. A. 245-6). This included the assets which had been in *Switzerland* on the date of the decedent's death (Rec. A. 127-8).

On September 30, 1958, the Hanover Bank executed a petition for the settlement of its intermediate account (Rec. A. 248). A citation was then issued but this was issued to the widow only (Rec. A. 248). The son was never cited (Rec. A. 7).

(i) The son's victory in the Court of Appeals of Geneva in November, 1958

While these accounting proceedings were pending, the appeal in the Court of Appeals of Geneva was argued on October 14, 1958 (Rec. A. 149).

On November 4, 1958 (Rec. A. 154), the Court of Appeals of Geneva reversed. It granted the son a

statutory share in the estate. It ordered the widow *in personam* to turn over to appellant his share and to furnish him with full information as to the contents of the estate and a copy of the inventory (Rec. A. 173). This judgment of the Court of Appeals of Geneva was final and *res judicata*. (Rec. A. 140)

(j) The subsequent New York decree of distribution of December, 1958

In the face of this judgment *in personam* against the widow, counsel for the widow and the Bank, on November 21, 1958, *seventeen days thereafter,* filed an affidavit certifying that only the widow had been cited and served with respect to the pending account in the Surrogate's Court (Rec. A. 245-6).

In the face of this judgment *in personam* against the widow, she requested the Hanover Bank on November 25, 1958, *twenty-one days thereafter,* to deliver to her in kind the Alcoa, Atchison, DuPont and General Electric stock certificates some or all of which had been in Switzerland on the date of death, and were still under Swiss administration. (Rec. A. 50, 127-8, 246-7).

The widow and her counsel permitted Surrogate Cox, on December 2, 1958 (*nearly thirty days thereafter*), to enter his decree on the accounting. This decree recites that the citation was issued to the widow only; it recites her request of November 25, 1958, *supra;* it approves the accounting up to September 18, 1958; and it directs the transfer to her of the four blocks of stock certificates in kind (Rec. A. 248-52). This was in direct contradiction of the prior Swiss final judgment of the Court of Appeals of Geneva.

(k) The widow's disobedience of the prior Swiss judgment in personam

In Geneva, in order to conform to the decision of the Court of Appeals (the court of last resort, Rec. A. 103), the 1954 "preliminary" certificate of heirship (Rec. A. 190), was amended "finally" on October 8, 1959, to certify the rights of the son (Rec. A. 194).

The widow has never obeyed the order of the Swiss Court, in whole or in part. The judgment of the Court of Appeals of Geneva of November 4, 1958, for the first time gave the son access to the contents of the estate and inventory (Rec. A. 61-2, 126-7, 173). Later, after the son's attorneys obtained access to the facts and to the governing documents late in the year 1959 (Rec. A. 61, 62, 126-7, 173), this proceeding was instituted in the Surrogate's Court (Rec. A. 26-64).

(l) The proceedings before the Surrogate to vacate the decree of distribution of December, 1958

The present proceedings began with a petition of the son to vacate the Surrogate's decree of probate dated May 16, 1957, *supra* (Rec. A. 27).

The son amended this claim to abandon any attack on the decree of probate of May 16, 1957 (which was concededly a valid and proper decree and immune from attack) and to concentrate on an attack *pro tanto* of the Surrogate's decree of distribution of December 2, 1958, insofar as that decree distributed the assets which were in Switzerland on the date of the decedent's death in accordance with the New York law of devolution (Rec. A. 6, 124). The matter has proceeded thereafter on that amended claim only.

At the hearing before the Surrogate the son based his claim upon the Supremacy Clause of the United States Constitution and the Swiss-United States Treaty of 1850. He asserted that the provisions in Article VI of the Treaty limited the jurisdiction of the Surrogate's Court and fixed a mandatory "choice of law" as the "supreme law of the land" (Rec. A. 7, 114-126). He further relied on the argument that the initial Swiss probate and the jurisdiction of the Swiss courts required the New York court to "stay its hand" (Rec. A. 120-4).

The widow defended against this claim on the merits and on the separate ground of estoppel, namely, that the son, by failing to appeal from the decree of probate of May 16, 1957 was estopped to attack the subsequent decree of distribution or raise any questions under the Treaty or the Supremacy Clause.

The Surrogate, following the close of the hearing and the filing of briefs, sustained the estoppel defense (App. p. 17a) and refused to consider any federal, Treaty or constitutional questions.

(m) Proceedings in the Appellate Division of the Supreme Court of New York

The son appealed from the Surrogate to the Appellate Division, raising the same federal and constitutional questions. (See App. p. 14a).

The Appellate Division affirmed the Surrogate without opinion, i.e., sustained the Surrogate's adjudication of the existence of an estoppel against the son, which forbade him from raising any of these federal, Treaty or constitutional questions.

(n) Proceedings in the Court of Appeals of New York

The son then appealed as of right to the Court of Appeals on federal constitutional grounds. (App. p. 10a) The widow filed a Motion to Dismiss on the ground that there was an adequate State ground at issue, i.e. estoppel and no federal or constitutional questions. The Court of Appeals denied the Motion to Dismiss. *Matter of Rougeron,* 14 N. Y. 2d 882 (1965).

(o) The 4-3 opinion of the Court of Appeals

The Court of Appeals affirmed in a 4-3 decision.

The majority opinion conceded the existence of the federal questions, i.e. "'consideration of the Treaty or of the proceedings in the Swiss courts now to be discussed" (App. p. 3a); recited the initial Swiss probate and the widow's assertion of the decedent's Swiss domicile (App. p. 3a); the widow's obtaining possession of the property located in Switzerland under the "preliminary certificate of heirship" and her subsequent removal of that property to New York (App. pp. 3a-4a); and recited the Swiss decree of November 4, 1958, deciding the substantive rights of the son in his inheritance. (App. p. 4a)

The majority opinion also conceded that the Swiss decree adjudicated that *the Swiss courts had exclusive jurisdiction* and *Swiss law was exclusively to be applied, under the Treaty,* (App. p. 4a; and further that the decedent was domiciled in Switzerland under *Swiss concepts of domicile.* (App. p. 4a).

The majority opinion passed over the widow's argument of estoppel (App. p. 5a) and held that "the meaning and application" of the Treaty "must be reviewed". (App. p. 5a)

The majority opinion then squarely held that the Treaty, in using the words "the country in which the property is situate", meant "the country of the last domicile of the decedent". (App. p. 7a). The majority opinion relied for authority on the writings of certain commentators, citing no authority of this Court or any federal court, since no such authority exists.

Concluding that the Treaty was a statement of the "conventional domiciliary rule as to personal property", the majority opinion sustained the jurisdiction of the New York courts over the Swiss property and the application of the New York law of devolution, giving no effect whatever to the pre-existing Swiss probate proceedings, the transport of the Swiss property from Geneva to New York *pendente lite* and the judgment *in personam* of the Swiss court. Having reached the conclusion that the Treaty was a "domicile" Treaty, the majority opinion then proceeded to ignore the real questions before it, namely, (1) What is to be done when proceedings are undertaken in *both* countries, and the courts of *each* country decide that the decedent was domiciled there, under its concept of domicile, so that each court decides that it has jurisdiction and its law of devolution applies? (2) What is to be done with the two diametrically opposed judgments of distribution of the same personal property? (3) What effect is to be given to the fact that such a "domicile" interpretation leaves both the Swiss and the New York judgments in full force and effect and provides for no choice between them? (4) What is to be done when one of the parties physically picks up a *res* which is *sub judice* in pending probate proceedings in one country and physically transports the *res* to another country and commences independent probate proceedings there?

The three dissenting judges disagreed fundamentally with the majority opinion.

There was agreement on the fact that there was no estoppel of any kind (App. p. 9a), but there was complete disagreement on everything else.

The dissenting judges stressed:

(1) their disapproval of the holding of the majority opinion, which gave the widow the right to "take the law into her own hands" to:

(a) change the devolution of property by using Swiss law to secure preliminary custody of the property and then spiriting it out of Switzerland.

(b) frustrate the pending Swiss proceedings by a self-help removal of the property.

(c) change the "choice of law" under the Treaty by the self-help removal of the property.

(2) the unique situation that the decedent was found domiciled in Switzerland under Swiss doctrines of domicile and found domiciled in New York under New York doctrines of domicile, a point to which the majority opinion ascribes no effect.

(3) that the New York courts had no jurisdiction over the Swiss assets or, in the alternative, was required to remit them to Switzerland for distribution under the Swiss decree.

(4) the need for a "suitable respect for the decrees of other civilized countries" which would deprive the New York court of power to frustrate the Swiss decree of devolution.

REASONS FOR GRANTING THE WRIT

A. This case raises questions of national and international importance never previously considered by this Court on the meaning and interpretation of Article VI of the Swiss-United States Treaty of 1850, and specifically:

(1) is the exclusive jurisdiction of courts and the exclusive choice of the law of devolution to be fixed by the "domicile" of the decedent at date of death or by the "situs" of property at date of death?

(2) do the words "place where the property is located" mean "place of the last domicile of the decedent" or do they mean what they say?

(3) if it is a "domicile" Treaty, how will it operate where courts of both countries independently decide that the decedent was domiciled in that country, so that both courts claim exclusive jurisdiction, both courts apply their own law, and two decrees are entered *in personam* and *in rem* containing antithetical distribution of the same property?

B. This case raises questions of national and international importance never previously considered by this Court as to the rules for the reconciliation of antithetical decrees *in personam* and *in rem* of a Swiss Cantonal Court of last resort and a State Court of last resort of the United States, determining the inheritance of personal property physically located in Switzerland on date of death, in independent actions in the two courts between the same parties and with respect to the same property, both decrees being entered in

alleged conformity with the Swiss-United States Treaty of 1850.

C. This case raises questions of national and international importance, never previously considered by this Court, as to the duty of a State Court of the United States either under the Treaty or, wholly apart from the Treaty, to stay its hand and refrain from undertaking the probate distribution of assets of a decedent, where probate proceedings for the distribution of those very assets are then pending *in personam* and *in rem* in the courts of Switzerland, the place where the decedent died and where the property was physically located on date of death, the property in question having been submitted voluntarily for probate administration and distribution to the Swiss court by the decedent's widow following the death of the decedent.

D. This case raises questions of national and international importance, which have never been previously considered by this Court of the right of a party to litigation *in personam* and *in rem* in a foreign country to remove the *res, pendente lite,* to the United States and by such self-help to frustrate the sovereignty and jurisdiction of the foreign tribunal and the ultimate final judgment *in personam* and *in rem* of the foreign tribunal.

E. This case raises questions of national and international importance never previously considered by this Court of the application of the doctrines of comity and of the recognition of foreign judgments *in personam* and *in rem.*

* * * * *

1. It will be obvious, from the preceding statement of the questions here presented, that this case presents

both Treaty questions and questions of international law absent any Treaty.

It is the contention of Petitioner that the majority opinion of the Court of Appeals is wrong (and the dissenting opinion of the three dissenting judges is right) by virtue of the Treaty, and, independent of the Treaty, on basic principles of international legal relations.

It is further the contention of Petitioner that these vital questions of national and international law should not be finally decided by this 4-3 opinion of the Court of Appeals of New York, (which will be the leading and only authority in the United States on the subject matter) without review and decision by this Court.

2. We can dispose quickly of any suggestion that there is an "adequate State ground" for the decision, i.e. that the case was decided on a point of procedural estoppel under State law and the federal questions need not be reached.

Both the majority and dissenting opinions excluded estoppel (App. pp. 5a, 9a) and both opinions decided the federal questions on the merits.

Further, this Court has ruled that it would be unconstitutional to refuse to decide a federal right in a State proceeding on the ground that the party raising the federal question was estopped from so doing by some procedural estoppel under the State practice. *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940); *Davis* v. *Wechsler*, 263 U.S. 22 (1923); *Morris* v. *Jones*, 329 U.S. 545 (1947); *American Railway Express Co.* v. *Levee*, 263 U.S. 19 (1923); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942); *Garner* v. *Teamsters, Chauffeurs and Helpers, etc.*, 346 U.S. 485 (1953); *United States* v. *Belmont*, 301 U.S. 324 (1937).

3. There is no ambiguity as to the purpose and intent of Article VI of the Treaty.

The Swiss Federal Supreme Court stated the purpose of the Treaty in *re Wohlwend,* 9.B.E. 507 (1883) at p. 513:

> "For Article VI sets forth a positive rule of international law, equally binding in both Treaty states, for the case where a citizen of one Treaty country dies in the other or leaves property in the other's territory."

There can be only one purpose and intent: to avoid unseemly conflict between the courts of Switzerland and of the United States, where courts of both Treaty countries claim jurisdiction over a disputed inheritance and the right to apply their local law to determine the devolution of the property in dispute, so that a head-on conflict will result.

The Treaty makes it clear that only one court is to have exclusive jurisdiction and that only one law of inheritance is to apply exclusively to the dispute, so that no head-on conflict can result.

The Treaty is, of course, unnecessary and inapplicable if only a single court of one Treaty country, and no other, claims jurisdiction over the dispute and only one law of devolution is sought to be applied.

Conversely, the Treaty is essential if a situation arises in which courts of both Treaty countries claim jurisdiction and claim that their local law of devolution is to be applied, so that a choice is required to avoid the risk of conflicting and inconsistent judgments.

We cannot stress this too strongly, because it is the key to the fatal error of the majority opinion.

In the light of this obvious purpose, the Treaty must be interpreted to give effect to this purpose. It must be applied if possible, in such a way that only one court has jurisdiction and only one law of devolution may be applied. An interpretation which permits courts of both Switzerland and the United States to have full contemporaneous jurisdiction *in personam* and *in rem* and permits the laws of distribution of both Switzerland and the United States to regulate the same inheritance, must be rejected.

An interpretation of a Treaty which will render it "null and inefficient" or "vain and nugatory" is inadmissible. It must be interpreted "in such a manner as that it may have its effect". *Geofroy* v. *Riggs,* 133 U.S. 258 (1890) at page 270.

Where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred. *Bacardi Corp.* v. *Domenech,* 311 U.S. 150, 163 (1940); *Hauenstein* v. *Lynham,* 100 U.S. 483 (1879); *Santovincenzo* v. *Egan,* 284 U.S. 30 (1931); *Kolovrat* v. *Oregon,* 366 U.S. 187, 193 (1961).

4. In the face of these rules of interpretation, the majority opinion interprets the Treaty as a "domicile" Treaty, which means that the court of "domicile" has exclusive jurisdiction of the disputed inheritance of the property which was in Switzerland on date of death (the "Swiss property") and the law of that country will apply exclusively to determine the devolution of the Swiss property.

The majority opinion overlooks the fact that such a "domicile" interpretation of Article VI violates both of the applicable rules of interpretation.

As we have noted, the Treaty is unnecessary where there is only one probate, where only one court claims jurisdiction and where all other courts in the Treaty countries decline jurisdiction. There is no conflict of jurisdiction, there are no double probates, no double administrations, no double and inconsistent judgments. There is nothing for the Treaty to resolve.

The Treaty is needed only where there is a conflict between two courts, because of double probate, double administration and double claims of jurisdiction over the same property. This has happened here. Each court claims that the decedent was domiciled in its territory, and that this validates that court's probate, administration and decree with respect to the Swiss property. Both the New York court's opinion (App. pp. 4a, 5a) and the Swiss court's opinion (Rec. A. 157-163, 173) specifically so claim. (See App. p. 4a)

A rule to resolve this unseemly dispute of probates and administrations is desperately needed. If the Treaty rule is "domicile" the Treaty is, by definition, impotent to provide the solution to the impasse. Each court has found that Rougeron was domiciled in its territory under its concept of domicile. If the Treaty is a "domicile" Treaty, then *both* courts have *exclusive* jurisdiction of the Swiss property; *both* probates are *exclusively* valid; *both* laws of inheritance are *exclusively* applicable; *both* antithetical decrees of devolution of the Swiss property are *exclusively* valid. The result is a travesty.

The international impasse, which the Treaty is intended to prevent and resolve, has been created and remains unresolvable. The Treaty is frustrated.

5. To the contrary, a "situs" interpretation of the Treaty permits it to resolve fully the present impasse. If the exclusive jurisdiction of courts is to be determined by the "location" of the disputed property, and if the law of that "situs" is to determine exclusively the inheritance of the disputed property, the New York courts can have no jurisdiction whatever over the property which was in Switzerland at date of death.

Under the New York law of "situs", the property in dispute had its "situs" in Geneva. *Hutchinson* v. *Ross,* 262 N.Y. 381, 390, 187 N.E. 65 (1933); *Houdayer's Est.,* 150 N.Y. 37, 44 N.E. 718 (1896); *Wayatt* v. *Fulrath,* 16 N.Y. (2d) 169, 211 N.E. (2d) 637 (1966) Under the Swiss law of "situs", the property in dispute had its "situs" in Geneva. (Rec. A. 168).

Instead of an unresolvable impasse, which results from the "domicile" interpretation, the "situs" interpretation resolves the impasse fully. It ousts the jurisdiction of the New York courts over the Swiss property; it excludes the application of the New York law of inheritance to the Swiss property. It makes the Swiss decree exclusively applicable to the inheritance of the Swiss property. The Treaty becomes a viable and potent international instrument, rather than a weak and impotent reed.

6. The words of the Treaty are clear and unambiguous. The formula for reconciling conflicts between two courts in cases of disputed inheritances is to fix the jurisdiction at the place where the property in dispute is "located". There may, it is true, be cases in which it may be difficult to determine the place where the property is "located". But this cannot alter the

meaning of the clear words of the Treaty, and convert it into a totally different concept, i.e. one of the "domicile" of the testator.

The Court of Appeals reached its conclusion that the words mean something other than what they say by drawing on the writings of certain commentators. *Miller, Treaties and Other International Acts of the United States of America,* Vol. 5, pp. 869 ff.; *Nussbaum, American-Swiss Private International Law,* 47 Columbia L. Rev. 186 (1947); *Falconbridge, Renvoi in New York and Elsewhere,* 6 Vanderbilt L. Rev. 708 (1953). The Court cited no judicial authority in the United States, either federal or state, because the only court in this country which has ever passed upon this Article held specifically that it was *not* a "domicile" Treaty, but a "situs" Treaty. *Re Schneider's Est.,* 96 N.Y.S. (2d) 652 (1950), rehearing 100 N.Y.S. (2d) 371 (1950). The repudiation of the "domicile" theory appears at 96 N.Y.S. (2d) at pages 656, 660. In the face of this, the majority opinion inexplicably cites *Schneider* as supporting the "domicile" theory (App. p. 6a).

Nor did the Court of Appeals cite any Swiss authority for the "domicile" theory, because the Swiss Federal Supreme Court, in every case which has come before it, has held that the Treaty is a "situs" Treaty, with "situs" to be determined in conformity with the Swiss doctrine of "situs". The Swiss Rougeron judgment (Rec. A. 168) cited and followed the two leading cases, (*re Wohlwend,* 9 B.E. 507 (1883) and *re Gemeinde Feldis,* 24 B.E. 312 (1898). See also *re Michael,* cited in *Gemeinde Feldis* at p. 319).

As to personal property, the Swiss internal law of "situs" is founded on a "fiction" (*Wohlwend, supra,*

at page 516) that personal property has its "situs" at the last domicile of the decedent, under Swiss concepts of domicile. *Ibid.* Therefore, as to personal property, it makes little difference to the Swiss whether the Treaty reads "situs" or "domicile".

However, as to real estate, the Swiss internal law of "situs" places this at the place of its actual location, not at the place of the last domicile of the decedent. Therefore, as to real estate, it is very important in Switzerland whether Article VI means what it says, or whether it means "domicile".

On this, there is no doubt. In *Gemeinde Feldis, supra,* at page 319, citing *Wohlwend, supra,* the Swiss Federal Supreme Court said:

> "Article VI of the aforesaid Treaty gives jurisdiction, in a dispute over an inheritance, to the courts of that country 'in which the property is located.' As the Federal Supreme Court, in the two cited cases, *in re Wohlwend* and *in re Michael,* has specifically adjudicated, this rule of competency means the courts of the last domicile of the decedent in the case of personal property—under the doctrine *mobilia ossibus inhaerent*—and the courts of the place where the land actually lies in the case of real property. . . ."

The Federal Supreme Court is saying, in unambiguous language, that Article VI is *not* a "domicile" article, but a "situs" article and is further stating, in unambiguous language, the internal local Swiss rules of "situs" for both personal and real property.

Accordingly, if this Court, following the principle of *Geofroy* v. *Riggs,* rejects the "domicile" theory in favor of the "situs" theory, in order to make the Treaty viable and effective and capable of resolving the

head-on collision between the Geneva court and New York court, this Court will merely be giving Article VI the same "situs" interpretation as the Federal Supreme Court of Switzerland has consistently given it beginning as far back as 1883.

The commentators, on whom the majority opinion relied, labor hard to convert the phrase "place where the property is located" into the phrase "place of the last domicile of the decedent". They do this by reliance upon some undefined and unwritten "understanding" of the negotiators of the Treaty.

However, the commentators' statement of the "understanding" is directly contradictory to the decisions of the Swiss Federal Supreme Court. *Miller, supra,* (page 869) states that the parties intended that the law of "the country in which the succession is opened" should govern "*all the property* forming part of the estate". *Nussbaum, supra,* copying *Miller* (page 195) states that the parties intended "the control of the law of the last domicile over the *entire inheritance question*".

The difficulty seems to be that neither Miller nor Nussbaum appear to have read *Gemeinde Feldis, supra,* or noticed that the Federal Supreme Court stated unconditionally that no one law under the Treaty, would have control over "all the property" or the "entire inheritance". To the contrary, a different law could apply to real property and to personal property, dependent upon the "situs" of the respective pieces of property.

Falconbridge is troubled by both Miller and Nussbaum. He begins with a frank admission that

> "the treaty specifies the law of the situs as the law governing succession" (p. 729)

and then states that "incredible as it may seem", it means the law of the decedent's domicile, citing Nussbaum as his authority (pp. 729-30, and fn. 68).

What the commentators are all saying, without realizing it, is that they believe that the United States negotiator in 1850 and the United States Senate, in 1855, agreed to adopt, as the "supreme law of the land" in the United States, the 1850 Swiss "fiction" of the "situs" of personal property. There is no word in any document to support such an understanding, which Falconbridge properly describes as "incredible".

8. If we were to assume, for purposes of argument, that the Treaty is a "domicile" Treaty, and that the majority opinion of the Court of Appeals is correct on this point, the case is far from concluded. To the contrary, a whole new series of important problems, relating to the rule of law in international affairs, is raised, all of which the majority opinion ignores.

If Article VI is a "domicile" article, then clearly *both* New York and Geneva have jurisdiction, and perhaps both have *exclusive* jurisdiction, whatever that may mean. The courts of New York have found that Rougeron was domiciled there, under New York concepts of domicile (App. pp. 4a, 5a) and the Courts of Geneva have found that Rougeron was domiciled there, under Swiss concepts of domicile. (Rec. A. 157-163) Each court therefore has jurisdiction over the disputed inheritance under the clear words of the Treaty, if Article VI is a "domicile" article.

The Treaty provides no formula for resolving such a head-on collision which will result from the finding of "double domicile" and "double jurisdiction". A formula does exist, however, in principles of sovereignty and international judicial administration out-

side the language of the Treaty, and which the dissenting judges sustained.

The record is incontestable that the Swiss probate proceedings were the initial probate and that they were started by the widow upon her assertion that Rougeron was domiciled in Geneva on date of death. (Rec. A. 46-55, 96-7) The record is incontestable that the widow, some months later, got conditional physical possession of the Swiss assets entirely through her prosecution of the Swiss probate proceedings. (Rec. A. 190) The record is incontestable that her possession was conditional only, and subject to further proceedings in the pending Swiss proceedings. (Rec. A. 100-2, 190) The record is incontestable that she used this conditional possession *pendente lite* to transport the Swiss property to New York to initiate a second independent probate there. (Rec. A. 34, 128) The record is incontestable that the final decree of distribution of the Geneva Court of Appeals, dated November 4, 1958, awarding the son his statutory share under Swiss law, preceded the final decree of distribution of the Surrogate in New York, dated December 2, 1958, awarding the entire estate, including the Swiss assets, to the widow alone. (Rec. A. 142, 248)

The majority opinion of the Court of Appeals ignored the prior Swiss jurisdiction, the transportation of the Swiss property *pendente lite* and the prior Swiss final decree of distribution.

The three dissenting judges, on the other hand, voiced grave concern over the widow's unilateral action of spiriting the Swiss property to New York and thereby impugning the existing Swiss jurisdiction and the sovereignty of the Swiss courts and frustrating the future Swiss judgment *in personam* against

the widow. They made the point neatly in a single sentence:

> "There is something wrong about allowing the widow to take the law into her own hands so as to change the devolution of this property by taking possession of it in Switzerland, under Swiss legal process, and then removing it to the United States thus thwarting its disposal by the Swiss courts under Swiss law" (App. p. 8a)

This court has stated, in cases involving a dispute between two State courts of the United States, that the managing of a decedent's property is a sovereign right which may not be readily frustrated, and that, absent full faith and credit requirements, the courts of the "situs" may determine the devolution of decedent's personalty which has its "situs" within its borders. *Riley* v. *New York Trust Co.,* 315 U.S. 343 (1942). This Court has also stated that a sovereign has the power to give its courts authority to settle the succession of estates and to determine finally as against all the world all questions which arise therein. *Tilt* v. *Kelsey,* 207 U.S. 43 (1907).

This Court has also stated, in cases involving a dispute between two State courts or between a State and a Federal court that the administration of property in the possession of one court of competent jurisdiction, cannot be disturbed by process out of another court. *Byers* v. *McAuley,* 149 U.S. 608 (1893); *State of Iowa* v. *Slimmer,* 248 U.S. 115 (1918); *Riley* v. *New York Trust Co., supra; Peck* v. *Jenness,* 48 U.S. 612 (1849).

Finally, this Court has stated, over a period of more than one hundred years, in cases between two State courts and between a State court and a Federal court, that where two courts independently have jurisdiction

over a *res*, specifically including administration of decedent's estates, the court which first acquires jurisdiction over the property is entitled to administer it to the exclusion of all other courts. *Princess Lida of Thurn & Taxis* v. *Thompson*, 305 U.S. 456 (1939); *Byers* v. *McAuley, supra; Yonley* v. *Lavender*, 88 U.S. 276 (1874); *Taylor* v. *Carryl*, 61 U.S. 583 (1857), citing Lord Ellenborough in *Payne* v. *Drew*, 4 East. 523 for the governing rule; *Hagan* v. *Lucas*, 35 U.S. 400 (1836). Chief Justice Taney in *Taylor, supra*, at p. 607, refers to this as a rule which is "universally recognized". See also *Williams* v. *Benedict*, 49 U.S. 107 (1850), where the property under administration by the Orphans' Court of Mississippi was held to be *in gremio legis* and exempt from the orders of any other court.

However, this Court has never ruled specifically whether these basic principles of "international" law are applicable to a dispute between a court of the United States and a court of a friendly foreign country. If the majority opinion of the Court of Appeals remains unreversed, the first and only United States authority on these matters will lay down the rule that none of these principles of judicial sovereignty and judicial administration are applicable to the jural relations between the United States and friendly foreign countries.

9. In the recent decision in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), this Court disapproved the concept that the unilateral action of a party to litigation, in the form of "self-help", could change the jural relations in an international matter. As this Court said, sustaining such "self-help" would be "hardly conducive to a peaceful international

order". This is no new doctrine, having been specifically stated by Mr. Justice Holmes in an interstate decedent's estate case in *Overby* v. *Gordon,* 177 U.S. 214 (1900).

Yet this is exactly what has happened in this case, a point which the majority opinion ignores and which the dissenting opinion stresses.

If the Swiss property had remained in Geneva until the final decree of distribution in the pending Swiss probate proceedings initiated by the widow, the Surrogate in New York could never have demanded that the Swiss property be removed from Geneva and transported to New York; nor could the New York court have entered any order binding the *res* already under Swiss administration; *Byers* v. *McAuley, supra; State of Iowa* v. *Slimmer, supra; Riley* v. *New York Trust Co., supra.* And when the Geneva court had entered its final decree of distribution *in personam* and *in rem,* that decree would have been *res judicata* of the distribution of the Swiss property. *Grant* v. *Buckner,* 172 U.S. 232 (1893); *Tilt* v. *Kelsey, supra; Hilton* v. *Guyot,* 159 U.S. 113 (1895).

Yet the majority opinion of the Court of Appeals sanctions the exact opposite conclusion, by validating the effect of the "self-help" transportation of the property by the widow to New York *pendente lite,* after she obtained conditional possession of the property as the result solely of the Swiss proceedings which she initiated. The dissenting judges vigorously disagreed (App. pp. 8a, 9a).

10. This Court has recognized "comity" as an important principle of the recognition of final judgments rendered by courts of other civilized countries. *Hilton* v. *Guyot, supra.*

The final decree of distribution of the Court of Appeals of Geneva, a judgment *in personam* and *in rem* in favor of Petitioner and against the widow (Rec. A. 142), was entered prior to the antithetical decree of distribution of the Surrogate against the Petitioner and in favor of the widow. (Rec. A. 248) The Geneva probate proceedings had preceded the New York probate proceedings by almost exactly one year. (Rec. A. 34, 42).

The majority opinion ignores the application of the rule of *Hilton* v. *Guyot;* the three dissenting judges refer specifically to "a suitable respect for the decrees of other civilized countries". (App. p. 9a)

11. The clash between the four majority judges and the three dissenting judges in the Court of Appeals presents diametrically opposed opinions on four questions of international law never adjudicated by this Court in any previous case.

(a) To what extent do the rules of "international" law, applicable to disputes between the courts of two States of the United States, over the administration of a decedent's property, apply to a dispute between a court of the United States and a court of a foreign country?

(b) To what extent do the rules of jurisdiction of courts, where more than one court in the United States has jurisdiction over some part of a decedent's assets, apply to jurisdiction between a court of the United States and a court of a foreign country?

(c) To what extent may a party to the administration of a decedent's estate in a foreign country, frustrate the sovereignty of the court which

is actually administering certain property physically before it, by physically transporting that property by "self-help" to a forum in the United States?

(d) To what extent is the judgment of a foreign tribunal, distributing personal property physically within its territory on the date of a decedent's death and voluntarily submitted to it for administration, conclusive and binding in the United States under the doctrine of comity?

All these basic principles—that of refusing jurisdiction over property already under administration in another court; that of abstaining from interference with the sovereignty and jurisdiction of another court; that of recognizing the final judgments of another competent court; and that of denying any party the right, by "self-help" remedies, to alter the jural relations between courts and between nations—are under attack in this case.

If the majority opinion of the Court of Appeals remains the definitive statement of the applicable principles in truly "international" disputes between courts, it will validate the effectiveness of "self-help" by a party to pending litigation in impugning the sovereignty and jurisdiction of courts, in frustrating judgments *in personam* and *in rem*, and in preventing a "peaceful international order" in civil litigation.

Resort to such "self-help" as the widow exercised here renders the recognition of sovereignty (with or without a Treaty) meaningless and the quest for a peaceful international judicial order in civil matters fruitless. If the condonation of "self-help" by the majority opinion remains unreversed, it would be

difficult to conceive of any stage of an international judicial proceeding which would hereafter be immune from the potential chaos of a "self-help" act by one of the parties.

We submit that the majority opinion of the Court of Appeals is a serious blow to all present efforts to create the rule of law in international affairs. The rule announced by the three dissenting judges would buttress those efforts substantially.

12. The key to this cause is the admission in the majority opinion that the Swiss courts adjudicated Rougeron's domicile to be in Switzerland while the New York courts adjudicated the domicile to be in New York. (App. pp. 4a, 5a) Then the majority opinion ignores this fundamental fact which has created the irreconcilable and unseemly conflict between the two tribunals.

The four majority judges permit the conflict of domicile and jurisdiction to be resolved by "self-help". They hold that the spiriting of the *res* out of one country into the other, by one of the parties, is the way in which the conflict should be resolved.

The three minority judges find this intolerable. They suggest that the proper rule must be that the tribunal whose jurisdiction over the *res* and the parties first attaches must be the tribunal whose exclusive power of adjudication over the *res* must be recognized by the other. Cf. *Overby* v. *Gordon, supra,* at pages 228-9. This is to be recognized, say the minority judges, either by the second court denying its own jurisdiction over the *res* or by the device of directing the party who has removed the property to return it to the court where the jurisdiction first attached. (App. pp. 8a, 9a)

CONCLUSION

Petitioner submits that the 4-3 decision of the Court of Appeals presents an appropriate and important case for this Court to review.

First, it requires the interpretation of a provision of a Treaty of the United States never before interpreted by this Court.

Second, it requires a definitive statement of the basic rules of international jural relations between a court of the United States and a court of a foreign country in civil litigation in the administration of a decedent's estate.

Third, it presents questions important to the development of a "peaceful international order" and the "rule of law" in international affairs.

For the reasons set forth in the Petition, it is respectfully requested that a writ of certiorari be granted.

Respectfully submitted,

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